UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | Case No.: 4:16-cr-176 CDP (DDN) |
| | ) | |
| SHAYNE KIER JONES., | ) | |
| | ) | |
| Defendant. | ) | |

## SENTENCING MEMORANDUM

COMES NOW Defendant, Shayne Kier Jones ("Jones"), by and through counsel, and files the following memorandum for sentencing.

### I. Background

On April 27, 2016, the government filed a two-count indictment, alleging Jones violated Title 18 U.S.C. §§ 1951(a) and 924(c)(1)(A)(ii), respectively. *See Indictment* [Doc. Text #25]. On December 6, 2016, Jones pled guilty to the indictment, *see Presentence Investigation Report* at ¶ 1 [hereinafter "*PSR*"], without a written agreement. *See id.* at ¶ 2. On February 7, 2017, the probation office filed its Disclosure PSR and calculated therein a total offense level of 25, a criminal history category of I, and a corresponding count one guideline range of 57 to 71 months. *See id.* at ¶¶ 36, 41, 72. It also calculated a count-two consecutive mandatory minimum sentence of 84 months, *see id.* at ¶¶ 37, 70, and a total punishment range of 141 to 155 months. *See id.* at ¶ 72. Three considerations suggest a 97-month sentence[1] will better serve the purposes of

[1] 97 months represents the low-end sentence the guidelines would assign to Jones under the normal operation of U.S.S.C. § 2B3.1 and in the absence of 18 U.S.C. § 924(c)(1)(A)(ii)'s 84-month, consecutive mandatory minimum penalty.

sentencing in this case, though: Jones' military service, his "fist-offender" status, and the impact of count two on his total range of punishment.

## II. Jones History and Characteristics

Two features of Jones' history and characteristics warrant sentencing consideration, his prior naval service and status as true first offender.

### A. Jones' Prior Naval Service

Jones enlisted in the United States Navy on February 19, 2007 and served through April 11, 2013. *See PSR* at ¶ 66. He received an honorable discharge and earned three commendations in his just more than six years of service. *See id.* This prior good act warrants as much consideration as any prior bad act might receive.

Courts commonly rely on prior bad acts, like prior convictions, to increase the punishment they mete-out. Historically, they've relied less on prior good acts to reduce punishment. But the primary purposes of sentencing, retribution and deterrence, do not provide a principled basis for this divide.

Retributivism justifies punishment as a proportionate response to the seriousness of an offense as measured by two considerations: the offender's blameworthiness and the harms caused by the offense. But prior bad acts, like prior convictions, do not fit neatly with these considerations. Prior bad acts provide no more data about an offender's present offense than do his prior good acts. They provide data only about the offender himself, a consideration unrelated to retributivism's present-offense focus.

Prior bad acts connect better with deterrence-based theories of punishment. For example, prior convictions hold considerable predictive power as to future criminality. In general, offenders with more prior convictions tend to commit more crimes and suffer more arrests than offenders with fewer convictions. Punishment increases for offenders with more prior convictions thus reduce the statistical likelihood of future criminality and promote specific deterrence in the process.

The connection between prior good acts and deterrence is less well-established, but not all together unstudied. For instance, a 1993 study by the New York Department of Correctional Services found "veterans…return to the [state's correctional] system at less than 80 percent of the rate at which similarly situated non-veterans return." Department of Correctional Services, New York, *Veterans Program Follow-up*, July (1993). Likewise, a 2000 report from the Bureau of Justice Statistics concluded incarcerated veterans were notably less likely to re-offend than their non-veteran counterparts. *See* Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Veterans in Prison or Jail* (2000).

Thus, some evidence suggests prior military service connects with deterrence-based punishment theories in much the same way as do prior convictions – as predictors of future criminality. Similarly, neither kind of act connects particularly well with retributivism. Despite this symmetry, courts continue to give substantial weight to one type of prior act but not the other, though no principled reason justifies this divide. Logically, so long as courts give weight to prior bad acts, like prior convictions, they should give the same to prior good acts, like Jones' six years of unblemished service to his country.

**B. Jones' First Offender Status**

Jones' criminal history category I status reflects his reduced re-offense risk relative to similarly situated offenders in every other criminal history category. *See* United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, pp. 28-30 (May 2004) [hereinafter "*Measuring Recidivism*"].

But his re-offense risk is lower than most criminal history category I offenders, as well. Jones is a divorced 30 year-old male with a high school diploma, a steady history of employment, and no meaningful history of substance abuse. *See PSR* at ¶¶ 44, 46-47, 51, 57, 59-66. According to the Commission, these variables correlate with reduced re-offense rates, *see Measuring Recidivism* at 28-30 (May 2004), and distinguish Jones as less likely to re-offend than most of his criminal history category I counterparts.

Jones' status as a "first-offender[2]" adds weight to this conclusion and distinguishes him further from other category I offenders. In fact, according to the Commission, "first offenders" are the least likely of all offenders to re-offend. See *Recidivism and the "First Offender": a Component of the Fifteen Year report on the United States Sentencing Commission's Legislative Mandate*, Introduction (May 2004). Among other things, "first offender" re-arrest rates fall 22.1 and 11.7 percent below their criminal history category I cohorts with either (1) one criminal history point, or (2) no criminal history points, but one or more prior arrests or uncounted convictions. *See The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* at 6 (Mar. 9, 2017) [hereinafter *Recidivism of Federal Offenders*].

"First offenders" are thus distinguishable from all federal offenders, other criminal history category I offenders included. *See id.* In light of this distinction, the Commission recently proposed to amend its criminal history measure to reduce "first offender" offense levels, *see* United States Sentencing Commission, *Proposed Amendments to the United States Sentencing Guidelines* at 1-2 (Dec. 19, 2016), and, in the process, better calibrate the criminal

[2] The term "first offender" includes offenders with one or more prior arrests, but excludes those with one or more prior convictions. *See Recidivism and the "First Offender": a Component of the Fifteen Year report on the United States Sentencing Commission's Legislative Mandate* at 17 (May 2004) [hereinafter "*First Offender Report*"]. Most criminal history category I offenders have one or more prior convictions and are not true first offenders. Jones has no prior convictions or arrests. *See PSR* at 39-43

history measure to the purposes sentencing. *See Recidivism of Federal Offenders, Introduction*, at 2 (Mar. 9, 2017). To the extent the Commission has concluded that reduced offense levels for "first-offenders" will better meet the purposes of sentencing, Jones' "first offender" status warrants this Court's sentencing consideration.

**III. Section 924(c)(1)(A)(ii)'s 84-Month Mandatory Minimum Consecutive Penalty Decreases Sentencing Proportionality and Increases Unwarranted Sentencing Disparity**

Primarily, Congress drafted the Sentencing Reform Act of 1984 ("the Act") for two reasons: to increase proportionality and decrease unwarranted disparity in sentencing. *See* United States Sentencing Commission, *Guideline Manual*, CH. 1 Pt. A (Nov. 2016). To further these ends, the Act created the United States Sentencing Commission to promulgate guidelines applicable to most federal offenses. The guidelines promulgated in the 30 years since constitute a complex set of rules designed to distinguish the varying culpability of otherwise similar offenders convicted of similar crimes and punish them in proportion to their offenses. USSG § 2B3.1 exemplifies this design and promotes the Act's primary purposes. In contrast, mandatory minimum penalties do not.

Jones' case illustrates the point. USSG § 2B3.1 assesses offender culpability based on seven different specific offense characteristics ("SOCs"). *See USSG § 2B3.1(b)(1)-(b)(7).* In the aggregate, these SOCs increase § 2B3.1's base offense level from 20 to a maximum of 43, a 23-level adjustment effected through incremental increases based on the varying harms associated with an offense. *See id.*

This system of incremental punishment fixes Jones' guideline range at 57 to 71 months, *see PSR* at ¶ 72, and would up it five offense levels more under USSG § 2B3.1(b)(2)(C) if no mandatory minimum penalty applied[3]. In turn, these five levels would push Jones' total offense level from 25 to 30 and increase his guideline range from 57 to 71 to 97 to 121 months, low- and high-end increases of 40 and 50 months, respectively.

Title 18 U.S.C. § 924(c)(1)(A)(ii) does not work this same way. Its penalty structure adds 84 months to the low-and high ends of Jones' range and increases his total punishment from 57 to 71 months to 141 to 151 months, increases of 44 and 30 months, respectively, over and above the hike § 2B3.1(b)(2)(C) would otherwise provide. This outcome more than doubles Jones' primary offense punishment based on a single offense fact that did not double the offense harms and, in so doing, decreases proportionality in sentencing.

As a corollary, this outcome increases unwarranted sentencing disparity, as well. Commission data make the point. In 2015, § 2B3.1 applied to 3,553 offenders. *See* United States Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based* at 18 (2015) [hereinafter "*Specific Offense Characteristics*"]. Of this number, approximately 1,827 were § 924(c) eligible because they either discharged, used, brandished or possessed a firearm during and in relation to their offense. *See id.*; *see also* United States Sentencing Commission, *Quick Facts, Section 924(c) Firearms Offenses* at 1 (2015) [hereinafter "*Quick Facts*"]. Of this number, approximately 716 were charged with a 924(c) offense; approximately 1,111 were not. *See Quick Facts* at 1; *See also Specific Offense Characteristics* at 18. Accordingly, a majority of § 924(c) eligible § 2B3.1 offenders were sentenced under § 2B3.1's ordinary operation. As a result, a minority of § 924(c) eligible § 2B3.1 offenders received mandatory minimum increased sentences relative to a majority of

[3] Section 2B3.1(b)(2)(C) increases § 2B3.1's base offense level by five when a firearm is brandished or possessed. Jones' offense level excludes this increase, *see id.* at ¶¶ 26 – 36, because his count two § 924(c)(1)(A)(ii) conviction accounts for this harm already. *See USSG § 2K2.4 cmt n. 4*. Thus, § 924(c)(1)(A)(ii)'s penalty replaces the penalty § 2B3.1(b)(2)(C) would otherwise apply.

similarly situated offenders who did not. For Jones, this outcome adds 44 to 30 months to his total low- and high-end range of punishment relative to similarly situated offenders not subjected to § 924(c)(1)(A)(ii)'s consecutive, minimum penalty. This outcome increases unwarranted sentencing disparity among otherwise similarly situated offenders convicted of similar crimes and runs afoul of 18 U.S.C. § 3553(a)(6) in the process.

## IV. Conclusion

Jones is a 30 year-old "first offender" with six years of unblemished naval service for which he received multiple commendations. As calculated, his total range of punishment is 141 to 155 months, a range 44 to 30 months, respectively, over and above that which the ordinary operation of § 2B3.1 would apply (97 to 121 months). As Commission data demonstrate, this outcome decreases sentencing proportionality, increases unwarranted sentencing disparity, and undermines the primary purposes of the Guidelines.

In contrast, a 97-month total sentence will yield an outcome consistent with the ordinary operation of § 2B3.1. In addition, it will account for Jones' prior naval service, "first offender" status, and the Guidelines' primary purposes. It will also punish Jones, who has served no prior period of incarceration, with a substantial term of imprisonment that will deprive him of what would other represent his prime years of productivity.

WHEREFORE, Defendant, Shayne Jones, respectfully requests this Honorable Court impose a 97-month sentence, a 44-month variance from the low-end of his § 924(c) enhanced 141 to 151 range of punishment.

Respectfully submitted,

ROSENBLUM, SCHWARTZ, & FRY, P.C.,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 12, 2017, the foregoing was electronically filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon Mr. Thomas Mehan, assistant United States attorney.